Nos. 90-1341 and 90-1517

IN THE SUPREME COURT OF THE UNITED STATES
*October Term, 1991*

**UNITED STATES DEPARTMENT OF ENERGY,**
*Petitioner/Respondent,*
vs.
**STATE OF OHIO et al.,**
*Respondents/Cross-Petitioners.*

# BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

DANIEL E. LUNGREN
*Attorney General of the State of California*
RODERICK E. WALSTON
*Chief Assistant Attorney General*
THEODORA BERGER
R. H. CONNETT
*Senior Assistant Attorneys General*
EDWIN F. LOWRY
*Deputy Attorney General*
Department of Justice
Sacramento, California 94244
Telephone: (916) 327-7876

GALE A. NORTON*
*Attorney General of the State of Colorado*
RAYMOND T. SLAUGHTER
*Chief Deputy Attorney General*
TIMOTHY M. TYMKOVICH
*Solicitor General*
MARTHA E. RUDOLPH
CYNTHIA M. VAGELOS
MARY CAPDEVILLE
*Assistant Attorneys General*
*Natural Resources Section*
[redacted]
*110 Sixteenth Street, 10th Floor*
*Denver, Colorado 80202*
*Telephone: (303) 620-4511*
**Counsel of Record*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes** **Page**

**Rules** **Page**

**Other Authorities** **Page**

Nos. 90-1341 and 90-1517

---

**IN THE SUPREME COURT OF THE UNITED STATES**
*October Term, 1991*

---

**UNITED STATES DEPARTMENT OF ENERGY,**
*Petitioner/Respondent,*
vs.

**STATE OF OHIO et al.,**
*Respondents/Cross-Petitioners.*

---

# BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS/CROSS-PETITIONERS

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

---

The States and Commonwealths of California, Colorado, Alaska, Arkansas, Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Washington, file the following Memorandum Brief in support of the position urged by the State of Ohio ("Ohio") in the above-captioned case.

## INTEREST OF AMICI CURIAE

Each of the 30 states and commonwealths joining this brief as friends of the court faces problems of enormous magnitude in enforcing state laws and regulations arising

under the Clean Water Act[1] and the Resource Conservation and Recovery Act.[2] These problems are frequently exacerbated by the presence in each state of what may be the nation's largest polluter: the United States Government. In many states, the federal government is a substantial discharger to state waters, and is one of the largest, if not the largest, generator of hazardous waste. To make matters worse, federal agencies have been among the most recalcitrant of polluters. Without the sanction of civil penalties, states will be hamstrung in their ability to compel federal agencies to comply with the law. Thus, each of the amici joining in this brief have an interest in the effective enforcement of their state laws through the penalty process.

## ARGUMENT SUMMARY

Federal agencies have strongly resisted the efforts of states and the federal government to enforce environmental laws. The Department of Energy (DOE) in particular has demonstrated a long history of noncompliance. Civil penalties are necessary to assure compliance with environmental laws.

Inherent in the concept of sovereign immunity is the sovereign's ability to waive its immunity. RCRA's waiver of the sovereign's protection against suit is plain, broad, and yields the unmistakable conclusion that penalties against the

---

[1]Water Pollution Prevention and Control Act (Clean Water Act or CWA), 33 U.S.C. §§ 1251-1387 (1988).

[2]Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988).

federal government are included within its terms.[3]

In this case, the issue is not whether the federal government has consented to be sued, or whether it has consented to subject important federal programs to potential interference from states through the judicial process. The federal government concedes as much, recognizing that RCRA has broad injunctive powers to which the Congress has waived sovereign immunity. The only question here is whether, in addition to exercising their injunctive powers, states can levy monetary penalties against federal agencies and instrumentalities that violate the law. Accordingly, this Court need only look, as precedent directs, to the ordinary meaning of the words Congress employed. Analysis that searches for hidden ambiguities in the statute is unwarranted. It leads to further litigation and promotes the drafting of ever-more complex and convoluted statutes that defy interpretation.

By subjecting the federal government to "all" RCRA requirements, both substantive and procedural, Congress stated its intention that the federal government is subject to penalties. Short of listing each and every possible variation of "requirements" to which the federal government is subject, it is difficult to construct a clearer waiver. In fact, Congress' choice of language dovetails precisely with this Court's decision in *Hancock v. Train*, 426 U.S. 167 (1976), where the failure to waive immunity for "all" requirements led this Court to conclude that the Clean Water Act could not be enforced against the federal government through the permitting process.

---

[3]RCRA § 6001, 42 U.S.C. § 6961. The full text of § 6001 is reproduced at p. 3a of the appendix in the brief of the petitioner, United States Department of Energy.

Amici also urge this Court to affirm the decision of the Court of Appeals as it relates to penalties under the citizen suit provisions of RCRA. As with the general penalty provisions of RCRA, amici do not see penalties as a means to fund their state treasuries; rather, they see citizen suit penalties as a valuable deterrent. Even when the penalty is paid by the United States to the United States, the inconvenience and embarrassment this process imposes on the officials of the penalized agency acts as a deterrent.

The CWA also waives federal sovereign immunity, expressly subjecting federal agencies to all water pollution control laws, whether at the federal, state, interstate or local level. The federal government is not questioning the amici's authority to sue the federal government for noncompliance with the CWA, again conceding such authority by recognizing the states' ability to obtain injunctive relief against federal agencies who violate the CWA. The issue instead is whether states can impose civil penalties against the federal government for violations of the water pollution control laws.

Civil penalties are a critical element to the successful administration of the CWA. The CWA provides for civil penalties and requires states to have the authority to collect civil and criminal penalties to obtain federal approval of their permit programs. By its terms, § 1323 of the CWA subjects the federal government to the imposition of civil penalties. The current language of § 1323 was crafted by Congress in 1977 in response to the federal government's long-standing failure to comply with the water pollution laws. This provision specifically subjects the federal government to **all** water pollution control laws, including civil penalties.

The ability to assess civil penalties against the federal government by necessity must extend to states because the

primary responsibility for administering the water quality programs under the CWA, and the only responsibility for enforcing these programs against the federal government, rests with the states. The objective of the CWA could not be fully realized without the authority of the states to impose civil penalties against the federal government. Accordingly, the amici states urge this Court to affirm the decision of the Court of Appeals regarding the authority of states to impose civil penalties under § 1323 of the CWA, and to recognize the states' authority to seek civil penalties pursuant to § 1365 of the CWA.

## ARGUMENT

### I.

### WITHOUT THE THREAT OF CIVIL PENALTIES, THE FEDERAL AGENCIES WILL NOT OBEY THE LAW.

Although Congress has repeatedly commanded federal agencies to comply with state and federal environmental laws, the federal agencies routinely ignore these commands. Their ability to brazenly violate these laws is bolstered by a Department of Justice policy that prevents the Environmental Protection Agency (EPA) from taking unilateral enforcement action against a sister federal agency. It is further bolstered by judicial decisions holding that the waivers of sovereign immunity contained in RCRA and other federal environmental laws do not extend to the imposition of fines and penalties. With little to fear from EPA, and without the prospect of being penalized for violating environmental statutes, regulations, permits or administrative orders, federal agencies have no incentive to divert attention -- and resources -- from their "primary" missions in order to

comply with environmental requirements. The Department of Energy's history of attempts to avoid RCRA regulation illustrate the problem.

This Court is already familiar with the federal agencies' reluctance to abide by the permitting requirements of state air and water pollution control laws. Thus, when this Court ruled in *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976), that the federal government had not waived its sovereign immunity regarding air and water quality permits, Congress reacted swiftly to amend the waiver of immunity. Congress was also careful to subject federal agencies to RCRA's permitting requirements when it first passed that Act.

The Department of Energy did not immediately take steps to comply with RCRA's permit requirements, however. To the contrary, the Department asserted that the statute did not apply to DOE because such application would be inconsistent with the Atomic Energy Act (AEA), 42 U.S.C. §§ 2011-2296 (1982) (AEA). Notably, EPA did nothing to challenge this interpretation. However, the Department of Energy's position was quickly rejected by the federal district court in *Legal Environmental Assistance Foundation v. Hodel*, 586 F. Supp. 1163 (E. D. Tenn. 1984).

The Department next sought to limit RCRA's application to its activities through rulemaking, by redefining "byproduct material," a term used in the Atomic Energy Act, to encompass mixtures of radioactive and hazardous wastes. 50 Fed. Reg. 45736 and 47409 (1985). Because the AEA reserves regulation of byproduct material at Department of Energy facilities solely to Department of Energy, this redefinition would have precluded RCRA jurisdiction over such materials. When persons commenting on the

Department's proposed definition pointed out that this redefinition was inconsistent with Congressional intent underlying the Atomic Energy Act, the Department of Energy conceded the issue and promulgated a more reasonable definition. 52 Fed. Reg. 15937 (1987).

Following this setback, the Department of Energy next asserted that certain mixtures of hazardous wastes and radioactive materials contained so much radioactive material that they were not "wastes" at all and thus not subject to RCRA, but "residues" that could be recycled. In ruling recently that the Department of Energy had violated RCRA by not obtaining a permit to store such residues at its Rocky Flats, Colorado, plant, the federal district court chastised the Department's recalcitrance:

> DOE has been duty bound for years to obtain its permit. Nevertheless, the record in this case shows a constant pattern of delay and obfuscation....
>
> Only on my questioning of government counsel at the ... hearing did DOE cease its circuitous reasoning and admit its undeniable RCRA violation.
>
> DOE's demonstrated attitude is that it is a governmental agency that can avoid RCRA's mandates indefinitely with impunity....
>
> Perhaps DOE's attitude toward RCRA stems from the lack of teeth in RCRA's enforcement mechanisms vis-a-vis DOE. Sovereign immunity bars state imposed civil and criminal

> penalties in actions against the DOE. [citation omitted]

*Sierra Club v. United States Dep't. of Energy*, Civil Action No. 89-B-181, slip op. at 15-16, (D. Colo. August 13, 1991). The district court's last statement, of course, was mandated by the Tenth Circuit's decision in *Mitzelfelt v. Dept. of Air Force*, 903 F.2d 1293 (10th Cir. 1990). In ordering DOE to obtain a state RCRA permit for the residues within two years, the court stated:

> DOE's ongoing disregard for RCRA's linchpin permit process has been flagrant. Absent appropriate sanction, I have no credible reason to believe that DOE will comply with a two-year time requirement. Therefore, I conclude that nothing less than the threat of shutdown on noncompliance with this order will effectively enforce the requirement that DOE obtain a RCRA permit....

*Sierra Club v. United States Dep't. of Energy*, slip op. at 16-17. As the court's opinion makes clear, absent civil penalties, the sanctions available to states to compel federal agencies to comply with the law are few, extreme, and unwieldy in many cases.

The Department of Energy's response to state efforts to enforce RCRA at its facilities reveals a pattern of delay and litigation that seems calculated to defer until the latest possible moment the time when it will actually have to comply with the law's requirements. Sadly, this pattern is not limited to Department of Energy, nor to RCRA, but is pervasive among federal agencies faced with the obligation to comply with environmental requirements. According to

the EPA, the Department of Defense and the Department of Energy's rate of compliance with RCRA is 10 percent to 15 percent lower than that of private industry. *Federal Facilities Compliance Act of 1991; Report from the Committee on Energy and Commerce to Accompany H.R. 2194*, 102d Cong., 1st Sess., Rep. No. 111 (1991) at 3 (hereinafter *Committee on Energy and Commerce Report*). Federal noncompliance with the CWA and state water quality acts is even more egregious. Nationwide, federal facilities' noncompliance rate with CWA environmental standards is twice that of private industry. GAO, Report to Congressional Requestors: *Stronger Enforcement Needed to Improve Compliance of Federal Facilities* (1988) at 3. During 1986 and 1987, twenty percent of 150 major federal facilities were not in compliance with the CWA. *Id.*

Under the "unitary executive" theory, Department of Justice forbids the EPA from going to court against its sister federal agencies. Its ability to require federal agencies to comply with environmental statutes has frequently been reduced to "jawboning" miscreant agencies and their facilities. Report of the National Governor's Association-National Association of Attorneys General Task Force on Federal Facilities, *From Crisis to Commitment: Environmental Compliance at Federal Facilities* (January, 1990) at 7. Thus, under RCRA and the CWA, only the states are able to bring federal agencies to court to enforce Congress' mandate that the federal government comply with all federal, state and local requirements respecting these environmental laws.

Civil penalties are an essential tool in the enforcement arsenal of amici's environmental programs. Indeed, the United States has argued in other enforcement cases, with judicial approval, that environmental regulatory agencies need both the ability to bring actions to prevent future

violations as well as the ability to punish offenders for past violations by assessing civil penalties. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 376 (10th Cir. 1979). Without the ability to seek and enforce penalties, injunctive relief is the only practical remedy available to states where federal facilities violate these laws. Although effective in stopping continuing violations at an individual facility, an injunction has little deterrent value. The facility which is found to have violated the law and suffers an injunction is no worse off than the facility which obeys the law in the first place, since the only penalty imposed upon such polluters is that they cease violating the law and correct past violations. As a result, the threat of an injunction does little to promote self-enforcement and voluntary compliance.

Civil penalties, on the other hand, act as a deterrent and promote self-enforcement and voluntary compliance. When violators are penalized for proven violations in addition to being ordered to correct them, the proven violator is left in a worse position than one who obeys the law. Civil penalties, therefore, provide an effective deterrent for violations not provided by injunctive relief alone. Without the authority to impose civil penalties, the states' ability to assure federal compliance with state laws governing solid and hazardous waste and water quality is significantly undercut.

## II.

## ANALYSIS OF RCRA'S PLAINLY-WORDED WAIVER OF SOVEREIGN IMMUNITY IS NOT AND SHOULD NOT BECOME A SEARCH FOR AMBIGUITY.

Although lengthy, RCRA § 6001 is plainly worded,

and the words which should control this case are few. When reduced to the elements that are essential to application of state solid waste and hazardous waste penalty provisions, § 6001 states simply that federal departments "shall be subject to and comply with all state ... requirements, both substantive and procedural ... in the same manner, and to the same extent, as any person is subject to such requirements."[4]

Time and again, this Court has stated that a plainly worded waiver of sovereign immunity should not bring with it additional exceptions or further roadblocks to suit. Instead, once authority is plainly given, it is liberally construed. (*See, e.g., United States v. Yellow Cab Co.*, 340 U.S. 543, 554-555 (1951) ["No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy"]; *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945) ["[W]e think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation"]; *United States v. Mitchell*, 463 U.S. 206, 219 (1982) ["'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"]) Once it is ascertained that Congress wrote a broad, unambiguous and comprehensive waiver of sovereign immunity, the conclusion necessarily follows that penalties are part of that waiver.

---

[4]The import of additional parts of § 6001, represented by ellipses in the main text herein, is discussed later in this brief.

### A. The Waiver of Sovereign Immunity in § 6001 is Plain, Broad, and Unmistakable.

The question before this Court is simply whether penalties are one of the set of "all requirements" to which Congress decreed the federal government is subject. In order to answer this question, an examination of the plain meaning of the statute is essential, since in construing the meaning of a statute, the courts ordinarily assume that legislative intent is expressed by the ordinary meaning of the words used. *Kosak v. United States,* 465 U.S. 848 (1948). This Court, while "strictly construing" waivers of sovereign immunity, has rejected overly restrictive interpretations based simply on the fact that suits against the sovereign are at issue. (*Canadian Aviator, supra.)*

In the case of RCRA § 6001, Congress declared that the United States is subject to **all** requirements, both substantive and procedural, in the same manner, and to the same extent, as any person is subject to such requirements. By its use of the word "all", Congress unmistakably expressed its intent to enact the broadest possible waiver of sovereign immunity, and to deprive agencies and departments of the United States of any exemption not available to others who are subject to solid and hazardous waste control laws. Similarly, by covering the universe of substantive and procedural requirements, Congress sought to avoid needless inquiry concerning artificial distinctions relating to the nature of the "requirements" to which the United States is subject. Nevertheless, even though the Department of Energy concedes that it is subject to "all" requirements (procedural and substantive), it argues that penalties are not a "requirement." Under the precedent discussed above, the linchpin of analysis is whether a plain reading of

"requirements" includes penalties. If, as amici contend, it does, then extended comparison to other statutes and legislative history[5] is unnecessary.

In "requirement," Congress deliberately chose a broad word, whose ordinary meaning encompasses any mandatory provision of law, including civil penalties. "Require" means "to direct, **order, demand**, instruct, command, **claim**, compel, request, need, or exact." Black's Law Dictionary, Revised Fourth Ed. at p. 1468 (emphasis added). "Requirements" mean "something called for or demanded." *Maine v. Navy,* 702 F. Supp. 322, 326 (D. Me. 1988), *appeal pending* No. 91-1064 (1st Cir.) A civil penalty mandated by statute is plainly an order, demand or claim, and is therefore within the common meaning of "requirement."

### B. "Penalties" Are Included in RCRA's Sovereign Immunity Waiver Even Though They Are Not Explicitly Listed in Section 6001.

As described above, Congress' broadly-written waiver plainly includes penalties within the sweep of the meaning of "all requirements." Indeed, "it is hard to imagine clearer language short of listing every possible variation of such requirements." *Maine v. Navy, supra,* 702 F. Supp. at 333.

---

[5]Amici believe that Congress should be able to rely on the plain meaning of the words it used, especially when those words follow the direction of this court in *Hancock v. Train,* 426 U.S. 167 (1976), discussed later in this brief. Amici do not, however, mean to suggest that the legislative history fails to support the conclusion that Congress intended to subject the federal government to penalties under RCRA. This analysis is ably presented by the State of Ohio and will not be repeated here.

Although Congress is not required to delineate an all-inclusive list of "every possible variation" defining "all requirements," it is this shortcoming -- and Congress' decision instead to list non-exclusive **examples** of requirements[6] -- upon which the Department of Energy seizes to avoid penalties as one of the requirements of state law to which it is subject. (Petitioner's brief, pp. 35 and 36.) Amici urge this Court to reject this overly-restrictive interpretation of RCRA's sovereign immunity waiver. The plaint that "civil penalties" are not specifically listed in the RCRA waiver at first blush seems appealing, since it seems little to ask Congress to add an additional two words totaling only 14 letters to the statute. Unfortunately, the argument, when carried to its logical conclusion, will preclude any categorical waiver of sovereign immunity -- no matter how sweeping -- and invite litigation in every case. Moreover, as is addressed in greater detail below, this argument ignores precedent from this Court upholding penalties in a waiver where there is no explicit mention of the word, and the argument seeks to apply a principle of statutory construction which should not be used to interpret a statutory list beginning with the word "including," as is contained in § 6001.

### 1. There is no requirement that Congress delineate "penalties" by name in order to waive the federal government's immunity to their imposition.

This Court's recent decision in *Goodyear Atomic Corp.*

---

[6] "The parenthetical list of "requirements" in RCRA section 6001, 42 U.S.C. 6961, to which the federal government is subject is for all substantive and procedural requirements, "(including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) ...."

*v. Miller*, 486 U.S. 174 (1988), stands squarely for the proposition that Congress need not expressly include the word "penalties" in order to subject the sovereign to penalties under state law. In *Goodyear Atomic Corp.*, an injured employee, suing under a state workers' compensation scheme, sought a supplemental award above the normal compensation because his injury was caused by the failure of his employer to comply with a specific state safety statute.[7] Although the statute subjecting the federal government to state worker compensation claims did not expressly authorize such additional payments, or penalties, the court found as in this case, that Congress simply subjected the federal government to workers' compensation laws at federal premises "to the same extent as such laws are applied to private facilities."[8] 40 U.S.C. § 290. The fact that immunity from suits for penalties was not specifically waived was of no consequence to this Court, which stated,

> [the contention] cannot be squared with § 290's plain language, which places no express limitation on the type of workers' compensation scheme that is authorized, or with the statute's history, which demonstrates that, at the time of its enactment, a substantial number of States provided additional awards

---

[7]Although the workers' compensation award was assessed against a private corporation, the nature of its relationship to the Department of Energy allowed it to assert completely whatever sovereign immunity was possessed by the federal government. The opinion carefully states that its analysis draws no import from the company's private sector nature. 486 U.S. at 180-181, and n. 2.

[8]Although neither the state statute nor the majority opinion characterize the supplemental awards as penalties, it is clear that they are. They substitute for punitive damages and are referred to as penalties no fewer than twelve times in the dissent.

> for violation of safety regulations, a matter of which Congress was presumably aware.

486 U.S. at 183-184.

Similarly, RCRA § 6001 places no limitation on the types of requirements to which the federal government was subject -- only that they be applied to private parties as well. And, Congress was undoubtedly aware of the penalty provisions within RCRA itself, as well as the fact that state statutes would be modeled upon them.

In *Goodyear Atomic Corp.*, this Court pointed out that a workers' compensation statute does not intrude significantly into the mission of the federal agency, and is therefore distinguishable from those involving "direct regulation of the operation" where the state is "claiming the authority to dictate the manner in which the federal function is carried out." 108 S. Ct. at 1710, and n. 3. The Department of Energy cannot reasonably argue that *Goodyear Atomic Corp.* is distinguishable from this case on this basis. Although RCRA **does**, to some degree, dictate the manner in which federal facilities operate by requiring them to obey certain pollution requirements, the states' power to dictate is not created by the penalty provision. As even the Department of Energy concedes in its brief, pp. 35 and 36, Congress has in fact already waived sovereign immunity for injunctive relief, and thereby consented to direct regulation of the manner in which the federal function is carried out, even to the point of shutting down a facility.[9] Having waived its immunity to suit in a manner which includes the potential of

---

[9]Although RCRA's waiver of sovereign immunity with respect to injunctive relief carries with it the threat of closing a federal operation completely, amici know of no instance where a state has, in fact, sought such relief through an injunction, much less succeeded in shutting down a federal facility.

direct state intermeddling into federal operations through injunctive relief, it cannot be said that subjecting the federal government to penalties involves any greater interference with control of the federal function. Accordingly, the analysis employed by this Court in *Goodyear Atomic Corp.* applies equally to this case with the same conclusion: the federal government is subject to penalties when it violates state hazardous and solid waste control laws.

**2. Congress' use of an exemplary list of "requirements" cannot be interpreted to mean that all items not on the list are implicitly excluded from the universe of "requirements" to which the federal government is subject.**

Without so stating, the Department of Energy relies upon the *expressio unius est exclusio alterius* rule of statutory construction in arguing that, since Congress had specifically mentioned reasonable service charges and various other terms in the parenthetical list of § 6001[10], it implicitly excluded all other types of fees or penalties from the potential universe of "requirements." The State of Ohio ably demonstrates that this interpretation does not follow, even if this unarticulated rule of statutory construction is followed. However, the rule is inapplicable. A long line of cases, beginning in this Court, sensibly holds that the *expressio unius* rule of statutory construction should not be used to interpret a statutory list beginning with the word "including." *Helvering v. Morgan's, Inc.,* 293 U.S. 121, 125, n.1 (1934); *Highway and City Freight Drivers, et al. v. Gordon Transporters, Inc.*, 576

---

[10]The text of the parenthetical list is contained in note 6, supra.

F.2d 1286 (6th Cir. 1978); *Puerto Rico Maritime Shipping Authority v. I.C.C.*, 645 F.2d 1102, 1112, n. 26 (D.C. Cir. 1981). Instead, the list of examples should be construed for what it is -- an illustrative list which is not meant to limit the broad range of "all requirements."

In a variation of the *expressio unius* theme, it is argued that penalties are an enforcement mechanism, as opposed to a "requirement," and, thus, all possible "enforcement mechanisms" were not expressly waived in § 6001. Both the Department of Energy, in arguments below, and the Ninth Circuit in *United States v. Washington,* 872 F.2d 874 (9th Cir. 1989), relied heavily on this distinction. However, in distinguishing "requirements" from "enforcement" mechanisms, one inevitably faces the insurmountable barrier that Congress flatly stated in § 6001 that an enforcement mechanism is in fact an example of a "requirement." Section 6001 explicitly waives immunity as to "all **requirements**, both substantive and procedural (**including** ... provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) ...." 42 U.S.C. § 6961 (emphasis added). On its face, then, Congress clearly contemplated that the word "requirements" includes civil enforcement mechanisms, and any distinction between civil penalties and other "requirements" on this basis is logically untenable.

The evolution of the various sovereign immunity waivers enacted by Congress in the past fifteen years in response to judicial interpretation of such statutes reveals a trend toward increasingly complex "list-like" provisions. (Compare, for example, § 118 of the Clean Air Act as enacted to its subsequent amendments.) Amici discern no tangible evidence that this trend has resulted in any reduction in litigation over the scope of sovereign immunity waivers or any greater consensus as to their meaning. Indeed, a strong

case can be made that the ineluctable effect of overly restrictive judicial interpretation is to cause Congress to enact excessively complex laws which ultimately compel the courts to engage in more, not less, interpretation. In other areas of the law, such as the interpretation of contracts and other legal instruments, modern courts have recognized that giving undue weight to what is not written, as opposed to what is, leads drafters away from plain and simple statements and toward unfathomable legalese. As a result, contemporary courts do not place undue emphasis on what could have been written, but instead attempt to give the full intended meaning to what was written. The Department of Energy's position here runs counter to that philosophy.

## III.

## IN ORDER TO GIVE MAXIMUM SCOPE TO RCRA'S WAIVER OF SOVEREIGN IMMUNITY, CONGRESS APPROPRIATELY RELIED ON THIS COURT'S FOCUS ON THE WORD "ALL" IN *HANCOCK v. TRAIN*.

This Court's decision in *Hancock* v. *Train*, 426 U.S. 167 (1976), is now a touchstone for any analysis of statutes relating to whether, and to what extent, Congress has subjected the federal government to state regulation in order to effect its stated purpose of achieving environmental compliance. *Hancock* crystallizes the command that waivers of sovereign immunity be "clear and unambiguous," 426 U.S. at 179, and the Department of Energy cites the case for this proposition. Elsewhere in this brief, amici argue that RCRA's waiver with respect to penalties is, in fact, clear and unambiguous. *Hancock* has additional value in the present analysis, beyond the command that a waiver be clear and unambiguous.

*Hancock* analyzed a phrase remarkably similar to RCRA's § 6001. It involved the question whether federal facilities were required to obtain state permits under § 118 of the Clean Air Act, 42 U.S.C. § 1857, as a condition of operation. Section 118 stated, in relevant part,

> Each department, agency, and instrumentality of ... the Federal Government ... shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.

After observing that "[t]here is no longer any question whether federal installations must comply with established air pollution control and abatement measures," this Court phrased the issue succinctly by stating "[t]he question has become how their compliance is to be enforced." 426 U.S. at 172. In determining that these standards could *not* be enforced through a permitting process, the decision focused on the word "all." This Court stated that § 118 was

> "notable for what it does not state .... It does not provide that federal installations 'shall comply with *all* federal state, interstate and local requirements ....' Nor does it state that federal installations 'shall comply with *all* requirements of the applicable state implementation plan.'" 426 U.S. at 182, emphasis in original.

In part because of this omission, no enforcement through permitting requirements was available against the federal government. If there is a lesson in statutory draftsmanship inherent in *Hancock*, that lesson is clear:

Congress should make sure to use the word "all" when it seeks to waive sovereign immunity for all purposes. And, that is precisely what it did in RCRA.

The *Hancock* opinion stresses, and, indeed, is based upon the distinction between **substantive** requirements to be achieved and the **procedure** to obtain compliance. Under *Hancock*, enforcement mechanisms are procedural in nature, and not covered by the limited sovereign immunity waiver drafted by Congress in that case. 426 U.S. at 182-186. In the case now before the Court the penalty provisions in RCRA are also enforcement mechanisms, and, under the *Hancock* analysis, are procedural. Recognizing this, Congress unmistakably expressed its intent that the federal government should be subject to civil penalties by providing a waiver for "all ... requirements, both substantive and procedural ... respecting control and abatement of solid waste or hazardous waste disposal...."

Thus, Congress responded to the second drafting lesson apparent in the *Hancock* opinion: a complete waiver of sovereign immunity should -- as it does here -- cover the universe of substance and procedure. Short of providing an exhaustive and comprehensive list of requirements -- a drafting technique nowhere required in statutory law or case precedent -- Congress did all it could, intelligently and reasonably relying on the *Hancock* analysis, to enact as broad and sweeping a waiver of sovereign immunity as possible.

## IV.

## RCRA ALSO SUBJECTS FEDERAL DEPARTMENTS AND AGENCIES TO PENALTIES UNDER ITS CITIZEN SUIT PROVISIONS.

Amici agree with and adopt the analysis of the State of Ohio concerning RCRA's citizen suit provisions. In this brief, amici will address only the seeming incongruity that states would seek penalties against the federal government which would then be placed in the federal treasury.

Despite the fact that penalties under RCRA's citizen suit provisions accrue to the federal treasury, amici's interest in being able to seek such penalties is as strong as the Department of Energy's interest in opposing them. Amici have no interest in funding state budgets through penalties derived from federal violations of environmental laws. The plain fact is that penalties increase compliance, and amici seek the ability to obtain federal compliance through use of all tools which Congress has placed at their disposal.

The purse into which citizen suit penalties are placed -- the federal treasury -- does not eliminate the deterrent value they present to the agency, the facility operator or base commander. At a minimum, the responsible official is faced with the prospect of returning to Congress or his budget office to explain why additional funds are needed to accomplish the agency's task. Penalties work on a variety of levels, including pain, inconvenience, and embarrassment. Further, the impact of penalties can still be substantial to the individual agency. Thus, although the deterrent effect might be less than a penalty which removes money from the federal fisc, the deterrent effect remains, and amici urge this court

to give full import to Congress' provision for citizen suits under RCRA against the federal government.

## V.

## ABSENT AUTHORITY TO ASSESS CIVIL PENALTIES AGAINST FEDERAL FACILITIES, STATES ARE UNABLE TO FULLY ACHIEVE THE OBJECTIVE OF THE CLEAN WATER ACT.[11]

### A. Congress has plainly required federal facilities to comply with the Clean Water Act.

The Clean Water Act has as its objective the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 251(a). To achieve that objective, Congress set as a national goal the elimination of the discharge of pollutants into the nation's navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Although this aggressive goal has not been met, it signifies Congress' commitment that **all** water pollution be eliminated. Congress granted no special exemption for federal facilities to disregard this national goal.

Unfortunately, federal facilities have not assumed the full responsibility of complying with water pollution control laws. To the contrary, federal facilities have, for decades, lagged far behind nongovernmental facilities in such

---

[11]The amici states concur with Ohio's position that the citizen suit provision of the CWA, § 1365, authorizes states to seek civil penalties against the federal government. For the sake of brevity, however, the amici will only discuss § 1323 of the CWA.

compliance. Recognizing the importance of federal facility compliance to achieve the objective of the CWA, and the failure of federal facilities to comply with water pollution control laws, Congress amended the CWA in 1972 to waive federal sovereign immunity for all federal, state, interstate and local water pollution control laws. 33 U.S.C. § 1323(a). Congress not only directed federal agencies to comply with all water pollution control laws, it expected federal agencies to lead by example:

> This [federal facilities pollution control] section would require every Federal agency with control over any activity or real property to provide national leadership in the control of water pollution in such operations.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3733. This federal leadership position has been affirmed by EPA:

> The EPA Administrator has stated that Federal facility compliance with pollution regulations should be a model for the rest of the regulated community and that they should lead the way in minimizing environmental contamination.
>
> EPA Federal Facilities Compliance Manual at I-1.

Federal agencies thus are required to comply with all water pollution control laws completely and expeditiously.

### B. Civil penalties provide needed incentive for federal agencies to comply with the water pollution control laws.

Civil penalties are an appropriate and effective enforcement tool that not only penalize for previous violations, but serve as a deterrent against future misconduct. Absent civil penalties, violators have little incentive to comply with the law, knowing that only after they are found in violation will they be required to comply with the law in the future.

The effectiveness of civil penalties as a deterrent makes them a critical element of the CWA's water pollution control program. Congress included civil penalties in the CWA to encourage prompt compliance with its requirements.

> The Committee believes that if the timetables established throughout the Act are to be met, the threat of sanction must be real, and enforcement provisions must be swift and direct. Abatement orders, penalty provisions, and rigid access to the Federal District Court should accomplish the objective of compliance.

S. Rep. No. 414, 92d Cong., 2d Sess. 64, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3737.

Throughout the CWA, Congress has made clear the importance of civil penalties in effectuating the goals of the CWA. In section 402 of the CWA, the EPA Administrator is given the authority to deny the approval of a state permit program if the state fails to provide adequate authority "to abate violations of the permit or the permit program,

**including** civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7) (emphasis added). The EPA regulations promulgated under this section **require** the state to possess the ability to assess and recover civil penalties before the EPA will allow a state to administer the CWA program. 40 C.F.R. § 123.27(a)(3) (1990). It is clear that at a very minimum, Congress and the federal agencies consider civil penalties an essential tool in the proper administration of the CWA. Without the ability to invoke civil penalties, a state will be denied all authority to administer the CWA permit program.

The federal government has on previous occasions itself emphasized the importance of civil penalties to the proper administration of environmental laws. In its comments submitted to Congress during its consideration of the Resource Conservation and Recovery Act, the Department of Justice wrote:

> the Department of Justice favors the inclusion of both civil and criminal sanctions for the most effective enforcement of environmental laws. It has been the experience of the Department ... that both sanctions are useful in different situations.

H.R. Rep. No. 1491, 94th Cong. 2d. Sess. 83-84, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6321.

Notwithstanding Congress' 1972 directive that federal agencies comply with all water pollution control laws, federal agencies convinced this Court that the 1972 version of the CWA's waiver of sovereign immunity did not extend to procedural obligations, thereby foreclosing the imposition of civil penalties against federal facilities. *EPA v. California*,

426 U.S. 200 (1976). Without the deterrent value of civil penalties for violations of water pollution control laws, federal agencies continued to ignore these laws. In response to *EPA v. California* and to *Hancock v. Train*, 426 U.S. 167 (1976), Congress quickly amended the CWA, this time to expressly authorize sanctions against federal facilities. 33 U.S.C. § 1323(a). Expressing the purpose of the amendments, the Senate Committee stated:

> This act has been amended to indicate unequivocally that all Federal facilities and activities are subject to **all** of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by Federal agencies, has misconstrued the original intent. (Emphasis added.)

S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4326, 4392. *See Metropolitan Sanitary District of Greater Chicago v. U.S. Department of Navy*, 722 F. Supp 1565, 1569 (N.D. Ill. 1989), *reconsidered in part* 737 F. Supp. 51 (N. D. Ill. 1990) (assessing penalties against federal facilities for CWA violations is entirely consistent with the goals of the CWA to achieve compliance with new standards).

With the 1977 amendments, Congress attempted to dispel any remaining doubts that it expected federal agencies to be subject to sanctions, including civil penalties for the violation of water pollution control laws. Notwithstanding this renewed directive to federal agencies, however, federal agencies continue to ignore Congress' mandate. This continuing disregard of the law is demonstrated in the Department of Energy's brief, p. 32, where it argues that the

United States is not subject to civil penalties at all under the civil penalty provision of the CWA.

Congress authorized civil penalties in the CWA as a deterrent to achieve its goal of eliminating all discharges of pollution into the nation's waters. Given the federal agencies' historic and continued resistance to environmental regulation, it is likely that this goal will not be met if the deterrent of civil penalties is not available against federal facilities. Congress could not have intended this result.

### C. Congress assigned to the States the primary responsibility to administer and enforce water pollution control programs under the CWA, and, in furtherance of this scheme, Congress authorized States to assess civil penalties against federal facilities.

Congress intended the states to have the primary responsibility to administer and enforce water pollution control programs under the CWA, limiting EPA's role to the supervision of the states.

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Chapter. It is the policy of Congress that the States manage the construction grant program under this Chapter and

implement the permit programs under sections 1342 [national pollutant discharge elimination system] and 1344 [dredge and fill] of this title.

33 U.S.C. § 1251(b). Despite this Congressional scheme, states continue to be frustrated at the ongoing failure of federal agencies to comply with the water pollution control laws administered by the states, and with the difficulty states encounter in inducing compliance. This frustration has become more acute because of the current policy of the Department of Justice which prohibits EPA from bringing an enforcement action against a sister agency. Thus, the states alone are left with the responsibility to enforce compliance with water pollution control laws at federal facilities.

The CWA goal of expeditiously eliminating all discharges of pollution would be undermined if Congress exempted federal facilities from compliance with the water pollution control laws. Any absence of state authority to assess civil penalties against federal facilities would have the effect of exempting federal facilities from compliance with these laws, at least until the time the noncompliance is detected. It is illogical to assume that Congress would have pressed the responsibility to administer the quality control program of the nation's waters into the hands of the states without giving them the full arsenal of enforcement alternatives to assure compliance. Significantly, Congress has amended the CWA twice, in 1972 and in 1977, each time to make more clear its intent that federal facilities are not to be immune from the full impact of the CWA and the water pollution control laws arising thereunder. Clearly, Congress intended states to have all the tools required to fully achieve the goals of the CWA. Congress did not omit the necessary component of civil penalties from the states' enforcement

authorities as both the CWA and legislative history prove. Thus, the amici urge this Court to recognize Congress' intent as reflected in the CWA, and hold that 33 U.S.C. § 1323, as well as § 1365, authorize states to assess civil penalties against federal facilities for violations of their water pollution control laws.

## CONCLUSION

The decision of the Court of Appeals as it relates to penalties under the general waiver of sovereign immunity contained in RCRA § 6001 should be reversed, and the decision of the Court of Appeals as it relates to the citizen suit provisions for penalties should be affirmed.

The decision of the Court of Appeals as it relates to penalties under the general waiver of sovereign immunity contained in the CWA § 1323 should be affirmed, and this Court urged to hold that states may impose civil penalties against the federal government under the citizen suit provision of the CWA, § 1365.

Dated: September 13, 1991.

Respectfully submitted,


DANIEL E. LUNGREN
*Attorney General of the State of California*

GALE A. NORTON*
*Attorney General of the State of Colorado*

RODERICK E. WALSTON
*Chief Assistant Attorney General*

RAYMOND T. SLAUGHTER
*Chief Deputy Attorney General*

TIMOTHY M. TYMKOVICH

THEODORA BERGER
R. H. CONNETT
*Senior Assistant Attorneys General*

EDWIN F. LOWRY
*Deputy Attorney General*

Department of Justice
Sacramento, California 94244
Telephone: (916) 327-7876

*Solicitor General*

MARTHA E. RUDOLPH
CYNTHIA MARIANTHE VAGELOS
MARY CAPDEVILLE
*Assistant Attorneys General*
*Natural Resources Section*

[redacted]

*110 Sixteenth Street, 10th Floor*
*Denver, Colorado 80202*
*Telephone: (303) 620-4511*
**Counsel of Record*

CHARLES E. COLE
Attorney General for the State of Alaska

GRANT WOODS
Attorney General for the State of Arizona
PAIGE MURPHY-YOUNG
Assistant Attorney General

WINSTON BRYANT
Attorney General for the State of Arkansas

RICHARD BLUMENTHAL
Attorney General for the State of Connecticut

WARREN PRICE, III
Attorney General for the State of Hawaii

LARRY ECHOHAWK
Attorney General for the State of Idaho

ROLAND W. BURRIS
Attorney General for the State of Illinois

LINLEY E. PEARSON
Attorney General for the State of Indiana

BONNIE J. CAMPBELL
Attorney General for the State of Iowa

FREDERIC J. COWAN
Attorney General for the Commonwealth of Kentucky

MICHAEL E. CARPENTER
Attorney General for the State of Maine
DENNIS J. HARNISH
Assistant Attorney General

J. JOSEPH CURRAN, JR.
Attorney General for the State of Maryland

FRANK J. KELLEY
Attorney General for the State of Michigan

HUBERT H. HUMPHREY, III
Attorney General for the State of Minnesota

WILLIAM L. WEBSTER
Attorney General for the State of Missouri

FRANKIE SUE DEL PAPA
Attorney General for the State of Nevada

TOM UDALL
Attorney General for the State of New Mexico

NICHOLAS J. SPAETH
Attorney General for the State of North Dakota

CHARLES W. BURSON
Attorney General and Reporter for the State of Tennessee
MICHAEL D. PEARIGEN
Deputy Attorney General

PAUL VAN DAM
Attorney General for the State of Utah
DENISE CHANCELLOR
Assistant Attorney General

MARY SUE TERRY
Attorney General for the State of Virginia
PATRICK O'HARE
Senior Assistant Attorney General

MARC RACICOT
Attorney General for the State of Montana

ROBERT J. DEL TUFO
Attorney General for the State of New Jersey

LACY H. THORNBURG
Attorney General for the State of North Carolina

T. TRAVIS MEDLOCK
Attorney General for the State of South Carolina

DAN MORALES
Attorney General for the State of Texas
THOMAS EDWARDS
Assistant Attorney General

JEFFREY L. AMESTOY
Attorney General for the State of Vermont

KENNETH O. EIKENBERRY
Attorney General for the State of Washington
JAMES K. PHARRIS
Senior Assistant Attorney General
JAY J. MANNING
Assistant Attorney General